Supreme Court, U.S.
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92-156

No. _____

In The

Supreme Court of the United States

October Term, 1992

AURELIA SCHOLAR,

Petitioner,

v.

PACIFIC BELL, a Pacific Telesis Company, a corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a *pro se* Title VII action was timely under 42 U.S.C. § 2000e-5(f)(1) when it was filed within 90 days of the plaintiff's personal receipt of the Equal Employment Opportunity Commission's right-to-sue notice but 93 days after the notice was delivered to her home, where it was signed for, misplaced, and forgotten by a visiting family member.

2. Whether the doctrine of equitable tolling applies in the circumstances described above, when the *pro se* plaintiff was relying on a letter from the EEOC, which stated that any lawsuit must be filed "within 90 days of the date you received the determination."

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Aurelia Scholar respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 30, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears in the Appendix hereto and is unofficially reported at 58 Fair Empl.Prac.Cas. (BNA) 1248 and at 58 Empl. Prac. Guide (CCH) ¶41,440. The District

Court opinion is unofficially reported at 58 Fair Empl.Prac.Cas. (BNA) 1243.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 30, 1992 and was reprinted with corrections on May 7, 1992. This petition for certiorari was filed within 90 days of April 30, 1992. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

STATEMENT OF THE CASE

Petitioner Aurelia Scholar filed a timely charge of national origin discrimination against her employer of 17 years, respondent Pacific Bell. On October 26, 1988, the Equal Employment Opportunity Commission (EEOC) sent Ms. Scholar a form right-to-sue letter by certified

mail, stating that it was dismissing her charge because the evidence did not establish a violation of the statute. The letter continued, "IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST." An accompanying information sheet on "Filing Suit in Federal District Court under Title VII" declared that any lawsuit must be filed "within 90 days of the date you received the determination." (Appendix, p. 12)

The EEOC's right-to-sue letter and information sheet were delivered to Ms. Scholar's home on November 1, 1988. Ms. Scholar was not at home at the time and her daughter Laurene, who was visiting, signed the return receipt. Laurene did not give or mention the materials to her mother, and forgot where she had placed them. The record does not reveal Laurene's age. (Appendix, p. 5; Clerk's Record [CR] 64)

Ms. Scholar came across the EEOC letter and information sheet several days later although she did not remember the exact date. At the time she was under heavy sedation for depression attributable to her employer's discriminatory treatment. Based on her psychiatrist's declaration, which stated that Ms. Scholar first mentioned the EEOC letter in her weekly treatment session on November 15, 1988 and had not mentioned it at the session on November 8 and that "it would have been inconceivable for her not to have talked about it upon receipt," it can reasonably be determined that she personally received the materials between November 9 and 15, 1988. (Appendix, p. 8; CR 55, 56 ¶15)

Ms. Scholar filed her Title VII action *in propria persona* on February 2, 1989. (CR 1) This was 93 days after delivery of the right-to-sue letter to her home but only 85 days after the earliest date on which she could have personally received it.

Respondent Pacific Bell filed a motion for summary judgment, asserting *inter alia* that the action was untimely. The district court granted the motion on other grounds, without ruling on the timeliness issue. The Court of Appeals for the Ninth Circuit affirmed the grant of summary judgment on the ground that Ms. Scholar's Title VII action was filed after the 90-day statute of limitations had expired and she had made no showing to justify invocation of the doctrine of equitable tolling. (Appendix, pp. 4-8)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 2000e-5(f)(1).

The Courts of Appeals are split on the issue raised by this case. The Seventh Circuit holds that the time to file runs from the date that the claimant personally received the right-to-sue letter, not the date it was delivered to his or her household. Thus, in *Archie v. Chicago Truck Drivers*, 585 F.2d 210 (7th Cir. 1978), the Seventh Circuit held that a *pro se* Title VII action was timely when it was filed 91 days after the EEOC letter was signed for by the

plaintiff's wife but 82 days from the date the plaintiff actually received the notice.

By contrast, the Fourth, Fifth, Eleventh, and now the Ninth Circuits hold that delivery to the household, rather than personal receipt by the discriminatee, starts the 90-day statute of limitations running. *Harvey v. City of New Bern Police Dep't.*, 813 F.2d 652 (4th Cir. 1987); *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247 (5th Cir. 1985); *Law v. Hercules, Inc.*, 713 F.2d 691 (11th Cir. 1983).

The courts of appeals for the other circuits have not squarely ruled on this issue although they have decided related questions. *See, e.g., Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472 (6th Cir. 1986) [where claimant fails to notify EEOC of address change, time starts to run five days after EEOC mails right-to-sue letter to claimant's address of record].

The Ninth Circuit's reasoning in the instant case conflicts with that of the Seventh Circuit in *Archie* in several major respects.

First, the Ninth Circuit held that the statutory language mandated that the 90-day period run from delivery to the household. It reasoned, "The language of the statute establishes the 90-day period as running from the 'giving of such notice' rather than from the date claimant actually 'receives' notice in hand. 42 U.S.C. § 2000e-5(f)(1)." (Appendix, p. 7) Sidestepping its own decision in an earlier case, in which it held that the "giving of such notice" required "receipt" and "actual notification" before the 90-day period began to run (*Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286, n.3 (9th Cir. 1977)), the court concluded that notice was "given" when

the right-to-sue letter was delivered to Ms. Scholar's residence and signed for by her daughter.

By contrast, the Seventh Circuit in *Archie* held that the "giving of such notice" language had to be liberally interpreted in light of the remedial purpose of Title VII. "Were we to read the doctrine of constructive receipt into the language of 42 U.S.C. § 2000e-5(f)(1), we would be 'condition[ing] a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute,'" the court stated. The purpose of the right-to-sue notice is to provide the claimant with formal notification that his or her administrative remedies have been exhausted and that the time to bring suit has begun to run, the court noted. This purpose has not been accomplished unless the claimant is actually aware of the right-to-sue letter. "[T]he claimant can hardly be said to have slept on his rights if he allowed the . . . period to expire in ignorance of *his right* to sue," the court stated (585 F.2d at 215-216, emphasis by the court), quoting *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976).[1]

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[1] In *Franks v. Bowman Transp. Co., supra*, the right-to-sue letter was received at Franks' mailing address by Franks' nine year old nephew, who lost the letter before Franks saw or read it. Approximately a year later, Franks contacted the EEOC and learned of the letter's delivery. The EEOC issued a new letter and Franks filed suit shortly thereafter. The Fifth Circuit held that, where "it is shown that the claimant through no fault of his own has failed to receive the suit letter . . . the delivery of the letter to the mailing address cannot be considered to constitute statutory notification." (495 F.2d at 405)

(Continued on following page)

The Ninth Circuit in the instant case also disagreed with the Seventh Circuit concerning the importance of establishing a "bright-line" date for the start of the 90-day filing period. The Ninth Circuit stated that " '[t]here is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless.' " (Appendix, p. 8, quoting *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982)).

The Seventh Circuit did not share such fears. In *Archie*, the court pointed out that the EEOC could avoid such a problem by authorizing delivery of right-to-sue notices only to the named recipients. If the agency did not take that approach, the district courts are "well able" to undertake the duty of fact-finding with regard to the date of actual receipt of the notice by a plaintiff, the court held. (585 F.2d at 216).

In the instant case, the Ninth Circuit recognized that its approach clashed with that of the Seventh Circuit in *Archie* but distinguished *Archie* on the ground that it was decided when the 90-day requirement was thought to be a jurisdictional prerequisite, not a statute of limitations. (Appendix, p. 6, n.3) That distinction does not hold water. The Seventh Circuit has reaffirmed its holding in

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(Continued from previous page)

More recently, the Fifth Circuit has limited *Franks* to its facts, holding that the 90-day filing period commences when the EEOC letter is delivered to the household if the claimant actually receives it at some later date. *Espinoza v. Missouri Pacific R. Co., supra*, 754 F.2d 1247.

Archie after recognizing that the 90-day limit is not jurisdictional. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316-1317 and n.2 (7th Cir. 1984).

Thus, the Ninth Circuit's holding in the instant case squarely conflicts with the decision of the Seventh Circuit. This head-on conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW RAISES IMPORTANT AND RECURRING PROBLEMS CONCERNING THE INITIATION OF A PRIVATE-SECTOR TITLE VII ACTION.

This Court has repeatedly granted certiorari to clarify the procedural requirements for initiation of a Title VII action. Less than two years ago, in *Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S.Ct. 453 (1990), a federal-sector Title VII action, the Court determined when the 30-day period under § 2000e-16(c) begins to run where the right-to-sue notice was delivered to the claimant's attorney. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court decided whether the time to file an individual Title VII action was tolled during the pendency of a class action where the individual claimant was a member of the class. In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), the Court considered whether filing of the right-to-sue letter with the district court constituted the commencement of a Title VII action.

The instant case potentially affects many thousands of persons, far more than *Irwin*, *Crown, Cork & Seal* or *Baldwin County Welcome Center*. In fiscal year 1991, for example, the EEOC issued 40,583 right-to-sue notices

based on charges filed against non-federal defendants. (Search of EEOC Charge Data System, Office of Program Operations (July 3, 1992)). That year, 7,089 Title VII actions were filed against such defendants. (Search of Statistical Analysis and Reports Division Data Base, Administrative Office of the U.S. Courts (July 14, 1992)). The question of when the 90-day period begins to run potentially impacted each of those cases.

The importance and recurring significance of this issue are evident from the number of decisions on this question. Five of the 12 circuits have ruled on this issue, some in repeated cases. *See* cases cited at pp. 4-5, *supra; see also, Bell v. Eagle Motor Lines, Inc.*, 693 F.2d 1086 (11th Cir. 1982). District courts have also confronted the point in numerous cases, with differing results. *See, e.g., Oswald v. Veeder Root Co.*, 662 F.Supp. 952 (W.D.Pa. 1987) [statute runs from delivery to plaintiff's address]; *Sanderlin v. La Petite Academy, Inc.*, 637 F.Supp. 1166 (E.D.Va. 1986) [same]; *Crofffut v. United Parcel Service, Inc.*, 575 F.Supp. 1264 (E.D.Mo. 1984) [statute runs from actual receipt by plaintiff]; *Killingham v. Board of Governors*, 549 F.Supp. 225 (N.D.Ill. 1982) [same]; *Fletcher v. Royston*, 30 Fair Empl.Prac.Cas. (BNA) 286, 290 (D.D.C. 1982) [same]; *Scarlett v. Seaboard Coast Line R.R. Co.*, 27 Fair Empl.Prac.Cas. (BNA) 624, 628 (S.D.Ga. 1977) [same].

Surprisingly, neither the Ninth Circuit nor the many other courts which have ruled on this issue have properly focused on the critical statutory language in section 2000e-5(f)(1): "the Commission . . . *shall so notify the person aggrieved* and within ninety days after the *giving of such notice* a civil action may be brought. . . . " Thus, the statute itself prescribes that the 90-day period begins to

run only after notice is given to "the person aggrieved." *Cf. Irwin v. Veterans Admin., supra,* 111 S.Ct. at 456 [§ 2000e-16(c) specifies that EEOC notification letter be "received" but does not specify by the claimant]. This critical failure in statutory analysis should be rectified by this Court.

Should the Court conclude that the 90-day period runs from delivery to the household, then applicability of the doctrine of equitable tolling would be an important question in this case, as it was in *Irwin* and *Baldwin County Welcome Center.* The EEOC's right-to-sue letter to Ms. Scholar stated, "IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO *WITHIN 90 DAYS FROM THE RECEIPT OF THIS DETERMINATION;* OTHERWISE THE RIGHT TO SUE IS LOST." (Appendix, pp. 10-11, emphasis added) This vague and confusing use of the word "receipt" was made affirmatively misleading by the accompanying one-page information sheet, which provided: "Should you wish to pursue this matter further, you may do so by filing a lawsuit . . . *within 90 days of the date you received the determination.*" (Appendix, p. 12; emphasis added)[2] Neither the Ninth Circuit in this case, nor any other circuit or district court, has ruled on whether a *pro se* plaintiff's reliance on this official

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[2] The form letter currently prescribed for use when the Commission dismisses a charge for lack of evidence of a violation states, "THE CHARGING PARTY MAY ONLY PURSUE THIS MATTER FURTHER BY FILING SUIT . . . WITHIN 90 DAYS OF THE *CHARGING PARTY'S RECEIPT* OF THIS LETTER." EEOC Compliance Manual (CCH) p. 372, emphasis added.

mis-advice provides a basis for applying the doctrine of equitable tolling. *Cf. Baldwin County Welcome Center v. Brown, supra,* 466 U.S. at 151 ["This is not a case in which a claimant has received inadequate notice. . . . "].[3]

CONCLUSION

For these reasons, a writ of certioari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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[3] The Ninth Circuit ignored these misleading letters in holding that Ms. Scholar had not made a showing to justify invocation of equitable tolling. The court stated that, even accepting Ms. Scholar's factual assertions as true, she had 76-83 days in which to file suit and she had offered "no explanation as to why this was not sufficient time in which to commence her action." (Appendix, p. 8) However, since the EEOC told Ms. Scholar that she could sue within 90 days from *her receipt* of the right-to-sue letter, this Court could apply equitable tolling to give Ms. Scholar the full period promised by the EEOC.

REPRINTED WITH CORRECTIONS MAY 7, 1992

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AURELIA SCHOLAR, *Plaintiff/Appellant,* v. PACIFIC BELL, A Pacific Telesis Company, a corporation, *Defendant/Appellee*	No. 90-15939 D.C. No. C 89-0309 DLJ OPINION

Appeal from the United States District Court
For the Northern District of California
D.Lowell Jensen, District Judge, Presiding

Argued and Submitted
October 9, 1991 – San Francisco, California

Filed April 30, 1992

Before: Thomas Tang and Stephen S. Trott, Circuit Judges, and James M. Burns,* Senior District Judge.

Opinion by Judge Burns

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* The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

COUNSEL

Ellen Lake, Oakland, California, for the plaintiff/appellant. Margaret deB. Brown, Sarah J. Diehl, Mary Lu Christie, Pacific Bell, San Francisco, California, for the defendant/appellee.

OPINION

BURNS, Senior District Judge:

Ms. Scholar appeals the district court's grant of summary judgment to Pacific Bell and dismissal of her claims for relief arising from alleged discriminatory employment practices by Pacific Bell. Ms. Scholar also appeals the district court's denial of her motion for leave to file a second amended complaint.

We have jurisdiction under 28 U.S.C. § 1291 (1988).

BACKGROUND

Ms. Scholar was an employee of Pacific Bell and its predecessor entity for approximately 17 years. She was employed in nonsalaried, nonmanagement positions governed by collective bargaining agreements. In 1980 Ms. Scholar's name was included in Pacific Bell's "Ready Now" Binder, a list of nonsalaried employees selected by their supervisors as candidates for promotion to management as positions became available. Although Ms. Scholar was never promoted to a management position during her long tenure with Pacific Bell, she does not

challenge Pacific Bell's employment practices prior to the events triggering this dispute.

In 1986 employees listed in the Ready Now Binder were reevaluated. Ms. Scholar's name was removed from the binder in 1987 following a fresh performance evaluation by her immediate supervisor; review of her employment record and current evaluation by the district's five engineering managers; and approval of the reviewers' decision by Arthur Scholar, District Manager and husband of Ms. Scholar. In 1988 Ms. Scholar took disability retirement. On February 2, 1989, she brought this action against Pacific Bell to recover back pay and to obtain contract damages and reinstatement to the management position she believes she should have had based on merit.

The district court granted Pacific Bell's motion for summary judgment on the grounds that federal labor law preempted Ms. Scholar's claim for breach of an implied-in-fact employment contract under state law and that no evidence of disparate treatment was established. The district court also denied Ms. Scholar's motion for leave to file a second amended complaint on the grounds that adding a claim of racial discrimination pursuant to 42 U.S.C. § 1981 (1988) would be repetitive of the claims already stated and, therefore, futile.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*, *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). The

appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring v. Kincheloe,* 783 F.2d 874, 876 (9th Cir. 1986).

A district court's decision to deny leave to amend a pleading is reviewed for abuse of discretion. *Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Serv. Bureau,* 701 F.2d 1276, 1292 (9th Cir.) *cert. denied,* 464 U.S. 822 (1983).

DISCUSSION

Although the district court did not grant summary judgment to respondent based on Ms. Scholar's failure to file her cause of action within the statutory time limit, we can affirm "on any ground supported by the record, provided the parties have had the opportunity to discuss it in their briefs." *Paskaly v. Seale,* 506 F.2d 1209, 1211 n.4 (9th Cir. 1974). *See also Lakeview Dev. Corp. v. City of South Lake Tahoe,* 915 F.2d 1290, 1299 (9th Cir. 1990), *cert. denied,* 111 S.Ct. 2890 (1991). Ms. Scholar's failure to file her Title VII action within the prescribed statutory period was raised in Pacific Bell's motion for summary judgment and presented to this court in the parties' briefs; counsel also devoted substantial time to the topic in oral argument before this court. We, therefore, affirm the district court's grant of summary judgment to respondent on the grounds that Ms. Scholar's failure to file her Title VII claim within the time limits prescribed by statute bars this action.

When the Equal Employment Opportunity Commission (EEOC) dismisses a claim, it is required to notify claimant and to inform claimant that she has 90 days to

bring a civil action, 42 U.S.C. § 2000e-5(f)(1) (1988).[1] The requirement for filing a Title VII civil action within 90 days from the date EEOC dismisses a claim constitutes a statute of limitations. *Edwards v. Occidental Chem. Corp.*, 892 F.2d 1442, 1445 (9th Cir. 1990). If claimant fails to file within the 90-day period, the action is barred accordingly. *Id.*

On October 26, 1988, EEOC sent Ms. Scholar a letter by certified mail informing her it had dismissed her claim and that she had 90 days from receipt of the letter to file a civil action. EEOC's "right-to-sue" letter was received at Ms. Scholar's house on November 1, 1988, and the return receipt was signed by her daughter. Ms. Scholar contends she did not personally see the letter until a few days later; the 90-day period did not begin to run until she personally received the letter; and, therefore, the civil action she filed February 2, 1989, was timely. For these reasons, Ms. Scholar argues we should return her case to the district court for a full trial. We reject this argument.

This court has not specifically addressed the issue of timeliness in filing a Title VII civil action under the fact

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[1] 42 U.S.C. § 2000e-5(f)(1) provides in part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved. . . .

scenario at hand;[2] however, we agree with the reasoning of the Fourth, Fifth, and Eleventh Circuits.[3] *See Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 653-54 (4th Cir. 1987) (court held 90-day period began when EEOC's right-to-sue letter was received by claimant's wife even though claimant did not learn of letter until six days later); *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247, 1248-50 (5th Cir. 1985) (court held 90-day period began when EEOC's right-to-sue letter was received by claimant's wife even though claimant did not learn about the letter until he returned from out of town eight days later); and *Law v. Hercules, Inc.*, 713 F.2d 691, 692-93 (11th Cir. 1983) (court held 90-day period began when claimant's 17-year-old son signed return receipt for EEOC's right-to-

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[2] Ms. Scholar contends this court indicated its interpretation of notice as it applies to 42 U.S.C. § 2000e-5(f)(1) when it stated in a footnote to *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286 n.3 (9th Cir. 1977), that "actual notification" of the 90-day period is required. In the footnote to *Lynn* the court was addressing the fact that the 90-day period begins to run when claimant receives the right-to-sue letter rather than when the letter is dispatched; the court's comments were not made in the context of the facts before us.

[3] Ms. Scholar relies upon *Franks v. Bowman Transp. Co.*, 495 F.2d 398 (5th Cir. 1974), *rev'd on other grounds*, 424 U.S. 747 (1976), and *Archie v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 585 F.2d 210 (7th Cir. 1978), *inter alia*, to support her position. The Fifth Circuit, however, distinguishes both *Franks* (one of its own cases) and *Archie* by pointing out that both cases were decided before it was determined that the 90-day requirement was a statute of limitation rather than a jurisdictional prerequisite, *Espinoza v. Missouri Pacific R.R. Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985).

sue letter in spite of claimant's contention he did not see the letter until one or two days later).

The language of the statute establishes the 90-day period as running from the "giving of such notice" rather than from the date claimant actually "receives" notice in hand, 42 U.S.C. § 2000e-5(f)(1). *See also Espinoza*, 754 F.2d at 1248-50. Ms. Scholar was given notice when the right-to-sue letter sent certified mail by EEOC was received and signed for by Ms. Scholar's daughter November 1, 1988, at Ms. Scholar's place of residence; thus, expiration of the 90-day period was January 30, 1989. Ms. Scholar acknowledges she read the letter a few days after it was delivered to her home and that she understood its contents. Ms. Scholar filed this civil action February 2, 1989, three days after the statute of limitations expired.

A statute of limitation is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis. *See Harvey*, 813 F.2d at 654. *See also Espinoza*, 754 F.2d at 1250. The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire, and when the EEOC's notice of the statutory period was clearly inadequate. *See Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S.Ct. 453, 457-58 (1990). *See also Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam). Courts have been generally

unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights." *Irwin*, 111 S.Ct. at 458. We find this to be the case here.

Ms. Scholar contends she learned of the letter some time between November 8 and November 15, 1988, a few days after her daughter signed for it. The only corroborating evidence presented was the statement by her psychiatrist as to when she told him about the letter. As the Eleventh Circuit cogently put it, "[t]here is no reason why a plaintiff should enjoy a manipulable open-ended time extension which could render the statutory limitation meaningless." *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982). Even if we accept Ms. Scholar's statements as fact, she still had 76-83 days in which to preserve her legal rights; Ms. Scholar offers no explanation as to why this was not sufficient time in which to commence her action.

Ms. Scholar has made no showing to justify invocation of the doctrine of equitable tolling. We find Ms. Scholar's Title VII civil action was filed after the 90-day statute of limitations expired and is, therefore, barred.

CONCLUSION

We find Ms. Scholar's cause of action is foreclosed because she did not file her Title VII civil action in a timely fashion in accordance with the statutory requirements. As a result, we do not reach the other issues presented by Ms. Scholar on appeal. Further, we decline

to exercise jurisdiction over the state claims because the federal claims were dismissed before trial.[4]

The district court's grant of summary judgment to Pacific Bell is hereby affirmed.

AFFIRMED.

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[4] "When federal claims are dismissed before trial, . . . pendent state claims also should be dismissed." *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 651 (9th Cir. 1984) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)).

[SEAL]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

TO: Aurelia Scholar
741 Glen Rd
Danville, CA 94526

October 26, 1988
Charge Number:
376870237

Aurelia Scholar
Charging Party

Pacific Bell
(Legal Dept)
Respondent

DETERMINATION ON REVIEW AND DISMISSAL
OF TITLE VII CHARGE

The Commission has reviewed the investigation of this charge of employment discrimination and all supplemental information furnished. Based upon this review, we agree with the determination issued by our field office and hereby issue a final determination that the evidence obtained during the investigation does not establish a violation of the statute. Therefore, the Commission dismisses and terminates its administrative processing of this charge.

As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in Federal District Court against the Respondent(s) named above within 90 days of receipt of this Determination.

IF CHARGING PARTY DECIDES TO SUE, CHARGING PARTY MUST DO SO WITHIN 90 DAYS FROM THE

RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST.

On behalf of the Commission:
/s/ Leonara L. Guarraia
Leonara L. Guarraia
Director
Determinations Review
Program

Enclosure: Information Sheet on Filing
Suit in Federal District Court

cc: Rolland D. Taylor
Director
Oakland Local Office

Charlie Wong
Acting Director
San Francisco District Off.

FILING SUIT IN FEDERAL DISTRICT COURT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000(e)

The Commission has determined that the evidence obtained during the investigation of your charge does not establish a violation of the statute. This determination completes our investigation and processing of your charge.

PRIVATE SUIT RIGHTS:

Should you wish to pursue this matter further, you may do so by filing a lawsuit against the respondent named in your charge in U.S. District Court within 90 days of the date you received the determination. Once this 90-day period is over, your right to sue will be lost. Filing this notice is not sufficient. A court complaint must contain a short statement of the facts of your case which shows you are entitled to relief.

Your lawsuit must be filed in U.S. District Court. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

ATTORNEY REPRESENTATION:

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, at its discretion, assist you in obtaining a lawyer to represent you. If you plan to ask

the U.S. District Court to help you find a lawyer, you must make this request of the court in the form and manner it requires. Your request to the U.S. District Court should be made well before the end of the time period mentioned above. A request for representation does not relieve you of the obligation to file a lawsuit within this 90-day period.

You may contact the EEOC office where you filed your charge if you have questions abut your legal rights including advice on which U.S. District Court can hear your case, or if you need to inspect and copy information contained in the case file.

DESTRUCTION OF FILE:

Generally, EEOC's rules call for your charge file to be destroyed two years from now unless you have notified us that you have filed suit in U.S. District Court. If you file suit, you or your attorney should forward a copy of your court complaint to the office where you filed your charge within 10 days after you file suit. Your file will then be preserved.

(ENCLOSURE WITH DRP NO CAUSE LETTER OF DETERMINATION)

FILED
AUG 17 1992
OFFICE OF THE CLERK

No. 92-156

In The

Supreme Court of the United States

October Term, 1992

AURELIA SCHOLAR,

Petitioner,

v.

PACIFIC BELL, a Pacific Telesis Company, a corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: August 17, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The petition for writ presents the following questions which do not merit this Court's review:

1) Whether the Ninth Circuit correctly found that the ninety-day statute of limitation for filing a Title VII action begins when the Equal Employment Opportunity Commission gives notice of a right to sue to a claimant at her designated address?

2) Whether the Ninth Circuit correctly found that the facts in this case do not establish a ground for equitable tolling of the statute of limitations under the standards established by this Court in *Irwin v. Veterans Admin.*, 498 U.S. ___, 111 S.Ct. 453 (1990) and *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam)?

PARTIES

All parties to the proceeding appear in the caption of the case.

Respondent submits the following information pursuant to Rule 29.1 of this Court's rules:

Respondent Pacific Bell is a wholly owned subsidiary of Pacific Telesis Group. All of Respondent Pacific Bell's subsidiaries are wholly owned except Bell Communications Research, Inc.

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No. 92-156

In The

Supreme Court of the United States

October Term, 1992

AURELIA SCHOLAR,

Petitioner,

v.

PACIFIC BELL, a Pacific Telesis Company, a corporation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Pacific Bell respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 963 F.2d 264. This opposition will cite to the copy of the opinion reprinted in the appendix to the petition for a writ of certiorari (hereinafter "App.").

STATEMENT OF THE CASE

A. Nature Of The Case

From 1971 to 1988, Petitioner Aurelia Scholar was employed by Respondent Pacific Bell in non-management positions governed by a collective bargaining agreement. (App., p. 2, CR 31, ¶¶1, 26.) Between 1980 and 1987, Ms. Scholar had been rated "ready" for promotion to management. (CR 31, ¶¶14, 75.) However, she failed to obtain any of the dozen management positions she applied for during that time. (App., p. 2, CR 31, ¶16.) In 1986, a committee of five engineering managers reviewed the performance and management potential of Ms. Scholar and nine other non-management employees in their district. (App., p. 3, CR 31, ¶49.) The committee recommended that Ms. Scholar not be included in the "Ready Now" Binder, the list of nonsalaried employees designated eligible to apply for promotion to management. (App., pp. 2-3.) In January, 1987, Arthur Scholar, Ms. Scholar's husband and the district manager who had final authority over the "Ready Now" Binder determinations, approved the committee's recommendation. (App., p. 3, CR 31, ¶75.)

Thereafter, Ms. Scholar filed a charge alleging national origin discrimination with the Equal Employment Opportunity Commission ("EEOC"). The EEOC found no violation of Title VII (CR 31, ¶83), and Ms. Scholar appealed. By a letter dated October 26, 1988, the EEOC notified Ms. Scholar that the final investigation found no violation of the statute and the charge was dismissed. (App., p. 10.)

The EEOC sent the right-to-sue letter to Ms. Scholar on October 26, 1988, by U.S. certified mail. (App., p. 5, CR 31, ¶87.) The right-to-sue letter was delivered to Ms. Scholar's home on November 1, 1988. (App., p. 5.) The receipt for the letter was signed "A. Scholar" on that date. (CR 35, ¶3, Exh. 1.) Ms. Scholar claims that her daughter Laurene Villa signed the postal receipt; the record reveals that Laurene Villa, whose birth name was "Aurelia Villalobos" (CR 64, ¶2), was approximately 28 years old in 1988. (CR 34, Exh. 1, p. 6.)

Ms. Scholar alleges that although the letter was delivered to her home on November 1, 1988, she did not see the letter "until a few days after November 1, 1988." (App., p. 5, CR 56, ¶15.) The only corroborating evidence Scholar presented was the affidavit of her psychiatrist, who speculated as to when she might have learned of the letter. (App., p. 8, CR 55, ¶4.)[1]

The right-to-sue letter and attached information sheet delivered to Ms. Scholar's home on November 1, 1988, both informed her that she must file a private action within "90 DAYS FROM THE RECEIPT OF THIS DETERMINATION; OTHERWISE THE RIGHT TO SUE IS LOST." (App., pp. 10-11.) Scholar acknowledged that she read the letter a few days after it was delivered to her home and that she understood the contents, including the ninety-

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[1] Pacific Bell objected to the psychiatrist's affidavit on the grounds that his notes constituted inadmissible hearsay under Federal Rules of Evidence 801 and 802 and inadmissible opinion evidence under Federal Rules of Evidence 602, 701, 702, and 703. (CR 67, pp. 10-11.)

day filing requirement. (App., p. 7, CR 31, ¶90.) Nonetheless, she did not file her original complaint in federal district court until February 2, 1989, ninety-three days after receipt of the right-to-sue letter. (App., p. 7, CR 31, ¶89.)[2]

B. Proceedings Below

Ms. Scholar alleged that Pacific Bell discriminated on the basis of her national origin when her name was removed from the "Ready Now" Binder and that the "Ready Now" evaluation breached express and implied employment contracts under California state law. (CR 4.) Pacific Bell moved for summary judgment on the grounds that 1) the complaint was not filed within the ninety-day statute of limitation for Title VII complaints, 2) the complaint failed to make out a *prima facie* case of national origin discrimination, and 3) federal labor law preempted the state law contract claims. (CR 29.)

The district court granted Pacific Bell's motion on the grounds that Ms. Scholar failed to establish a *prima facie* case of discrimination, and that the contract claims were

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[2] Petitioner notes that she filed the complaint *in propria persona*. (Pet. for Writ, p. 4.) On October 2, 1989, Mr. Glenn Walling became Ms. Scholar's attorney of record. (CR 66, ¶6.) In a declaration filed with the district court, Mr. Walling stated that "[e]ven though plaintiff had the benefit of a legal advisor from time to time, she was not represented by counsel of record until October 2, 1989." (*Id.*) Mr. Walling represented Ms. Scholar in a settlement conference on July 18, 1989, although he was not counsel of record. (CR 52, ¶¶3, 4.)

governed by a collective bargaining agreement and thus preempted by federal law.[3] (App., p. 3.)

On appeal, both parties briefed and argued the issue of Ms. Scholar's failure to file her Title VII action within the statute of limitations prescribed by 42 U.S.C. § 2000e-5(f)(1). (App., p. 4.) A panel of the Ninth Circuit unanimously affirmed the grant of summary judgment on the grounds that Ms. Scholar failed to file her Title VII claim within ninety days from the receipt of the right-to-sue letter at her home, and she presented no evidence warranting equitable tolling. (App., pp. 8-9.) In reaching this decision, the Ninth Circuit relied on applicable precedent from the Fourth, Fifth and Eleventh Circuits and this Court. (App., pp. 5-8.) Ms. Scholar did not file a petition for rehearing.

REASONS WHY THE PETITION SHOULD BE DENIED

This case poses no special and important questions which merit this Court's discretionary review. The Ninth Circuit expressly followed the lead of the Fourth, Fifth and Eleventh Circuits when it held that the Title VII statute of limitations runs from the date a right-to-sue letter is delivered to a claimant's home, not the date she actually reads the letter. (App., pp. 5-6.) That holding

[3] The district court also denied Ms. Scholar's request to amend the complaint to add a claim for racial discrimination under 42 U.S.C. § 1981. The court held that, because she failed to show disparate treatment under Title VII, the proposed amendment under section 1981 would also fail and therefore was futile. (App., p. 3, CR 71, p. 13.)

comports with this Court's recent ruling that the statute of limitations for a Title VII suit against the federal government begins to run when a right-to-sue letter is delivered to the home of the claimant or the office of his attorney, whichever is earlier. *Irwin v. Veteran's Administration*, 498 U.S. ___, 111 S.Ct. 453 (1990).

The petition claims that the decision in this case creates a conflict with the Seventh Circuit's opinion in *Archie v. Chicago Truck Drivers*, 585 F.2d 210 (7th Cir. 1978) (Judge Wood dissenting). (Pet. for Writ, pp. 4-8.) However, as the Ninth Circuit pointed out, *Archie* is now dubious authority. (App., p. 6, n.3.) The foundational assumption in *Archie* that the ninety-day period is jurisdictional rather than a statute of limitation subject to equitable tolling has been overruled, and more recent cases in the Seventh Circuit have limited the holding of *Archie* to its facts. *See St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir. 1984). Thus, this case does not represent a "head on" conflict with *Archie*. (Pet. for Writ, p. 8.)

The Ninth Circuit found that the facts presented by Ms. Scholar did not warrant equitable tolling under the guidelines set forth in *Irwin, supra*, and *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984) (per curiam). That finding presents no special issues of general application which warrant review.

A. The Court Of Appeals' Decision Comports With The Language Of 42 U.S.C. § 2000e-5(f)(1) And Precedent From Other Circuits

The Court of Appeals properly found that the EEOC gave Ms. Scholar notice when the right-to-sue letter sent

certified mail was received and signed for at Ms. Scholar's residence. (App., p. 7.) This finding correctly interprets the language of 42 U.S.C. § 2000e-5(f)(1) which establishes the statute of limitations for private sector Title VII actions; it specifies that the ninety-day period runs from the EEOC's "giving of such notice" rather than from the date the claimant actually "receives" or reads the notice.

In ruling that Ms. Scholar had been given notice when the right-to-sue letter was delivered to her home, the Ninth Circuit also relied on the guidance of cases involving almost identical fact scenarios from the Fourth, Fifth and Eleventh Circuits. (App., pp. 5-7.) *See Harvey v. City of New Bern Police Dept.*, 813 F.2d 652, 654 (4th Cir. 1987) (period began when letter delivered to claimant's home and received by his wife, not when claimant actually received letter); *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247, 1250 (5th Cir. 1985) (period began when letter delivered to claimant's address and accepted by wife, not when claimant read letter several days later); *Law v. Hercules, Inc.*, 713 F.2d 691, 693 (11th Cir. 1983) (period ran from date that claimant's son picked up right-to-sue letter, not the date when son gave letter to claimant). The Sixth, Seventh, Eighth, and District of Columbia Circuits have also ruled that the language of 42 U.S.C. § 2000e-5(f)(1) does not require that a claimant be given actual notice of the right-to-sue letter before the ninety-day period begins. *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989) (ninety-day period began when letter delivered to claimant's former address, not when claimant actually received letter); *Hunter v. Stephenson Roofing, Inc.*, 790 F.2d 472, 475 (6th Cir. 1986) (period runs

from date five days after letter sent to claimant's former address, not when claimant actually saw letter); *Josiah-Faeduwor v. Communications Satellite Corp.*, 785 F.2d 344, 345 (D.C. Cir. 1986) (period runs from the date letter delivered at office of claimant's counsel, not from date that claimant received a copy); *St. Louis v. Alverno College*, 744 F.2d 1314, 1317 (7th Cir. 1984) (ninety-day limit begins running on the date letter was delivered to address claimant provided to EEOC, not on date claimant finally received the letter).

Although this Court has not ruled on when the statute of limitation begins running for private sector Title VII claimants, it has ruled that the limitation period for claims against the federal government begins when a right-to-sue letter is delivered to the claimant's address or to the office of his attorney, whichever comes first. *Irwin v. Veterans Administration*, 498 U.S. ___, 111 S.Ct. 453, 456 (1990). In *Irwin*, this Court interpreted 42 U.S.C. § 2000e-16(c), which required government employee claimants to file complaints " '[w]ithin thirty days of receipt of notice of final action taken. . . . ' "[4] 111 S.Ct. at 455. This Court held that a complaint, filed twenty-nine days after the claimant received a right-to-sue letter but forty-four days after the letter was delivered to his attorney's office, was properly dismissed as untimely. This Court noted that "§ 2000e-16(c) requires only that the EEOC notification letter be 'received'; it does not specify receipt by the claimant. . . . " 111 S.Ct. at 456.

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[4] 42 U.S.C. § 2000e-16(c) now provides that Title VII complaints against the federal government must be filed "[w]ithin ninety days of receipt of notice of final action. . . . "

In addition to abiding by the statutory language and precedent from other Circuits, the Ninth Circuit's decision fosters certainty and curtails factual disputes regarding notice. As this Court pointed out in *Irwin*, the "practical effect" of the actual notice interpretation urged by the Petitioner in this case "would be to encourage factual disputes about when actual notice was received, and thereby create uncertainty in an area of the law where certainty is much to be desired." 111 S.Ct. at 456. The Ninth Circuit's holding gives meaning to the statutory limitation, creates the desired certainty and presents no grounds for this Court's review.

B. The Seventh Circuit's Decision In *Archie v. Chicago Truck Drivers* Does Not Create A Conflict Which Merits This Court's Review

The petition rests on the shaky foundation of a 1978 Seventh Circuit decision, *Archie v. Chicago Truck Drivers*, 585 F.2d 510 (7th Cir. 1978). In that decision, two members of the panel held that the Title VII statute of limitations began to run when the claimant actually read the right-to-sue letter rather than when his wife received the letter at their home. As the Ninth Circuit explained in this case, the twin pillars of the majority decision – the assumption that the ninety-day period was jurisdictional and a Fifth Circuit case – have now been discredited. (App., p. 6, n.3.) The dissenting judge in *Archie* stated that "an employer is entitled to a more certain rule and one that does not create a temptation for family perjury which will often be difficult, if not impossible to reveal." 585 F.2d at 223. Recent decisions in the Seventh Circuit have

limited the *Archie* "actual notice" holding and, as discussed above, other Circuits have opted for the dissent's "more certain rule" finding "receipt" when a right-to-sue notice is delivered at a claimant's address.

First, the Seventh Circuit in *Archie* assumed that compliance with the ninety-day period is "a jurisdictional prerequisite to suit, and failure to comply with that time limitation will terminate the complainant's cause of action." 585 F.2d at 214. This assumption influenced the majority's decision to start the time period when the claimant actually received the right-to-sue letter and thus to save his cause of action. However, the Seventh Circuit's rationale is no longer good law. The Seventh Circuit now recognizes that time requirements in Title VII are statutes of limitations subject to waiver, estoppel and equitable tolling. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316, n.2 (7th Cir. 1984), discussing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). *See also Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986) (ninety-day period is a statute of limitations).

As this Court found in *Zipes*, the distinction between a jurisdictional requirement and a statute of limitations is significant.

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement to give prompt notice to the employer. 455 U.S. at 398.

As *Archie* is based on a now overruled assumption that negates the purpose of the filing requirement, it does not conflict with the Ninth Circuit's decision.

Second, the majority in *Archie* relied heavily on *Franks v. Bowman Transportation Company,* 495 F.2d 398 (5th Cir. 1974), rev'd on other grounds, 424 U.S. 747 (1976). *See Archie,* 585 F.2d at 215-16. In *Franks,* the Fifth Circuit found that because the claimant's nine year old nephew accepted and lost the first right-to-sue letter, claimant's time to file suit did not begin to run until he received a new letter from the EEOC. However, the Fifth Circuit now has re-examined its rationale in *Franks* and adopted a rule that "the giving of notice to the claimant at the address designated by him suffices to start the ninety-day period. . . . " *Espinoza v. Missouri Pacific R. Co.,* 754 F.2d 1247, 1250 (5th Cir. 1985) citing *Bell v. Eagle Motor Lines, Inc.,* 693 F.2d 1086 (11th Cir. 1982). Thus, the Fifth Circuit's support of the *Archie* decision has been eroded.

Finally, the Seventh Circuit itself has curtailed the "actual receipt by claimant" rule of *Archie. See Jones v. Madison Services Corp.,* 744 F.2d 1309, 1312 (7th Cir. 1984) (ninety-day period begins to run on date right-to-sue notice is received by claimant or by his attorney); *St. Louis v. Alverno College,* 744 F.2d 1314, 1317 (7th Cir. 1984) (ninety-day period begins to run on date right-to-sue letter is delivered to address claimant provided to EEOC, not when claimant actually receives letter). In short, the petition does not cite any recent Seventh Circuit decision which squarely conflicts with the Ninth Circuit's ruling in this case. Accordingly, the petition presents no conflict between the Courts of Appeals which warrant this Court's review.

C. Court Of Appeals' Finding Of No Facts Justifying Equitable Tolling Does Not Present A Grounds For This Court's Review

The Ninth Circuit followed this Court's guidance and found that Ms. Scholar made no showing to justify invocation of the doctrine of equitable tolling. (App., pp. 7-8, discussing *Irwin v. Veterans Admin.*, 498 U.S. ___, 111 S.Ct. 453, 457-58 (1990); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam).) This holding does not present an important or special question for this Court's review.

The petition alleges that the right-to-sue letter mislead Scholar because it stated that a suit must be filed "within 90 days of receipt of this Determination." (Pet. for Writ, p. 10, App., pp. 10-11.) However, in *Baldwin*, this Court noted that almost identical language[5] provided an *in propria persona* claimant adequate notice of her obligation to file a complaint within ninety days. 466 U.S. at 151. Moreover, Ms. Scholar admitted that she read the letter a few days after it arrived at her home and understood the contents. (App., p. 7.) As the Ninth Circuit found, even accepting Ms. Scholar's account of the facts, she had ample time to file a complaint, yet failed to do so and offered no explanation for her delay. (App., p. 8.)

The Ninth Circuit's ruling on a factual issue presents no important question for this Court's review, especially

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[5] In *Baldwin*, the claimant received a notice which stated that if the claimant decided to sue her employer "such suit must be filed in the appropriate United States District Court within ninety days of [her] receipt of this Notice." 466 U.S. at 148.

because the decision conforms to the standards enunciated by this Court in *Baldwin* and *Irwin*. This Court has "been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Irwin*, 111 S.Ct. at 458. Thus, the Ninth Circuit correctly found that to allow Ms. Scholar additional time to file based on her psychiatrist's conjecture about when she might have received the notice would foster "a manipulable open-ended time extension" and thus "render the statutory limitation meaningless." (App., p. 8, citing *Lewis v. Conners Steel Co.*, 673 F.2d 1240, 1242 (11th Cir. 1982).)

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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